



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Civil Appeal Case 70/17

In the matter between:

PURELL (PTY) LTD

Applicant

And

LUNGISANI VILAKATI

Respondent

In Re:

PURELL (PTY) LTD

Appellant

And

LUNGISANI VILAKATI

Respondent

Neutral citation: *Purell (Pty) Ltd vs Lungisani Vilakati (70/17) [2018] [SZSC]14*
(23rd May, 2018).

Coram: **S.B. MAPHALALA JA**

Heard: **2ND MARCH, 2018**

Delivered: **23RD MAY, 2018**

Summary: *Applicant failing to comply with the Rules of Court – only applies for extension of time – in terms of Rule 16 –has failed to apply for condonation in terms of Rule 17 of the Appeal Court Rules – therefore, Application dismissed with costs at the ordinary scale.*

JUDGMENT

S.B. MAPHALALA JA

[1] Before this court, is an Application for an extension of time in terms of Rule 16 of the Rules of court, to file a complete record of proceedings.

[2] Rule 16 of the Court of Appeal's Rules of 1971 provides the following:

“16(1) The Judge President or any Judge of appeal designed by him may on application extend ant time prescribed by these rules:

Provided that the Judge President or such judge of appeal may if he thinks fit refer the application to the Court of Appeal for decision.

(2) An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which prima facie show good cause for leave to be granted.
(underlining my own emphasis)

[3] The Applicant filed a Notice of Application in terms of the above mentioned Rule for orders in the following terms:

- 1. Condoning the Applicants non-compliance with the Provisions of Rule 30 (1) of the Rules of Court relating to the filing of the record of proceedings.**
- 2. That the Applicant be and is hereby granted an extension of time to file the complete record of proceedings.**
- 3. That the Applicant be and is hereby granted leave to file the record of proceedings out of time.**
- 4. Further and/or alternative relief.**

[4] It is contended by Mr Hlophe for the Applicant that this Application for extension of time was made immediately it became apparent to Applicant it would not be possible to file the record of proceedings timeously as envisaged by Rule 30(1) of the Rules of Court.

[5] The attorney for the Applicant proceeded to outline the sequence of events in paragraphs 2.1 to 2.4 of the Heads of Arguments of Applicant's attorneys to the following:

2.1 Applicant's Attorneys were furnished with the record of proceedings on Thursday the 28th September 2017. Upon perusal, the Attorneys discovered that the transcribed record was not complete as it did not contain part of the evidence led during the trial.

2.2 Upon realization that the transcript of the record was incomplete, the Applicants Attorneys immediately engaged the clerk of court responsible for the transcription. It, however, transpired that the recording was faulty on some days when the witness gave their evidence. As such no recording took place at all, thus incomplete transcript. The attorneys were advised to request that the Judges notes be made available to enable to transcript of the record to be completed.

2.3 The Clerk to the Judge *a quo* being approached by Applicant's Attorneys advised that the notes would be made available to them on Monday the 2th October 2018. However, it also transpired that the Judge's notes could also not be found as his Lordship in the court *a quo* was using evidence pads to take notes as opposed to the Judge's note book.

2.4 It is submitted the Monday 2nd October, 2017 was the last day on which Applicant was required to file the complete record in terms of the Rules. It was then that Applicants Attorneys immediately prepared the Application for extension of time which was duly signed on the 3rd October 2017.

- [6] The main argument advanced on behalf of the Applicant is that the provisions of Rule 16 of the Rules of Court do not prescribe a time period for which such an application should be made. That therefore a delay of one day in filing the application outside the prescribed two (2) months period (which elapsed on Monday the 2nd October, 2017) was in the circumstances of the case not unreasonable.
- [7] Furthermore, it is contended for the Applicant that it harboured no reasonable apprehension that there could be a delay in filing the record within the prescribed time period. This is because Applicant's Attorneys were advised to come on the 2nd October, 2017 for the complete record. That the Judge's notes would be utilised to make a complete transcript of the record. It was on the last day that they were advised that the Judge's notes could also not be found hence the transcript of the record remained incomplete.
- [8] On the other hand the Respondent's contends otherwise in that the present Application before court has been moved in terms of Rule, that is, for extension of time. That clearly, this Application is questionable from the application made in terms of Rule 17 of the Rules. That Rule 17 application are for failure to comply with the Rules, whereas application in terms of Rule 16 are for leave to grant an extension of time within which to take a step prescribed by the court rules.
- [9] Further it is contended for the Respondent in his Answering Affidavit that the Application has been filed out of time. That Respondent further asserted that the Applicant ought to have moved the present application before the expiry of 2 months period, and upon a reasonable application that the record would not be filed timeously.

- [10] To buttress its case the Respondent has cited a **plethora** of decided cases by this court including the cases of **Sibusiso Boy Boy Nyembe vs Pinky Lindiwe Nyembe (born Mango) Appeal Case No. 62/2008**, the case of **Berry Anita Belinda vs A.G. Thomas (Pty) Ltd, Civil case No. 30/2015** and that of **Unitrans Swaziland Limited vs Inyatsi Construction Limited (9/96) [1997] SZSC 41**.
- [11] In my assessment of the arguments of the parties the first question I need to address in the resolution of the above arguments of the parties is the contention by the Respondent of whether a proper Rule of Court has been used by the Applicant. The Respondent contends in this regard that this Application is questionable from an Application made in terms of Rule 17 of the High Court Rules. That Rule 17 application are for failure to comply with the Rules, whereas an application in terms of Rule 16 are for leave to grant an extension of time within which to take a step.
- [12] The answer to the above question lies in the Rules of Court themselves. I ought to examine each rule as referred by the Respondent to determine the efficacy of the Respondent's arguments. If I find that the Respondent is correct that the Applicant has applied an incorrect Rule to dismiss the Application forthwith. On the other hand if I find otherwise, to proceed with the consideration of the Application in terms of Rule 16 as contended by the Applicant.
- [13] Rule 16 of the High Court Rules has been reproduced at paragraph [2] of page 2 of this judgment to the effect that the **Judge President or any other Judge of Appeal designated by him may on application extend any time prescribed by these Rules**. The sub-rule further provides that the Judge President or such Judge of appeal may if he thinks fit refer the application to the court of Appeal for decision.

[14] In sub-rule 2 thereof provides that an Application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which *prima facie* show good cause for leave to be granted.

[15] On the other hand Rule 17 as contended by the Respondent provides that the Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these rules and give such directions in matters of practice and procedure as it considers just and expedient.

[16] The position of the law regarding these two Rules of court was considered by this court in the case of **Dr Sifiso Barron vs Dr Priscilla Dlamini Criminal Appeal No. 9/2014** where **Annandale AJA** of that court stated the following:

When regard is to be given to the rules which could have assisted the Appellant to seek condonation and extension of time, it requires the context of the situation to be considered. Moreover, an application for condonation must be necessity preceded the consideration for the possible granting of condonation for non-compliance with the rules. Regrettably, this court was not even presented with an application at the last minute to excuse the Appellant from its predicament.

[16] In the present case it also appear to me that the Applicant has ignored the provisions of Rule 17 but went on straight to argue its Application in terms of Rule 16. On the legal authority of the above case of the Supreme Court cited at paragraph [15] the Application ought to be dismissed with out any further ado. Moreso, the attorney for the Applicant did not say a thing in his arguments to answer this point.

[17] In the result, for the foregoing reasons the Application is dismissed with costs levied at a normal scale.



S.B. MAPHALALA JA

For Applicant:

Mr S. Hlophe
(from C.J. Littler & Co.)

For Respondent:

Mr A. Hlophe
(Magagula Attorneys)

